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SUPPLEMENTAL TRANSCRIPT OF RECORD

Nos. 548-9, October Term, 1952

Bridges et al. vs. United States of America

Nos. 12597–12607

United States Court of Appeals

For the Ninth Circuit

HARRY RENTON BRIDGES, HENRY SCHMIDT and J. R. ROBERTSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

and

HARRY RENTON BRIDGES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court, Northern District of California, Southern Division

Proceedings Had in the United States Court of Appeals for the Ninth Circuit

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

Nos. 12,597 and 12,607

In the United States Court of Appeals
for the Ninth Circuit

No. 12,597

HARRY RENTON BRIDGES, J. R. ROBERTSON and HENRY SCHMIDT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 12,607

HARRY RENTON BRIDGES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL PETITION FOR REHEARING, PRAYER THAT SUPPLEMENTAL PETITION FOR REHEARING BE HEARD EN BANC, AND THAT ORDER DENYING PETITION FOR REHEARING BE VACATED

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Table of Authorities Cited

Cases	Pages
Bradley Mining Company vs. Boice (1952, 9 Cir.), 198 F.2d 790	8444, 8450
Bridges, et al. vs. United States (Sept. 6, 1952, 9 Cir., No. 12,597, Slip Sheet p. 52), ... F.2d	8443
Gottfried vs. United States (2 Cir.), 165 F.2d 360	8447
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United States vs. Smith (1952), 342 U.S. 225 8449

Western Pacific Railroad Corporation vs. Western Pacific Railway Company (1952, 9 Cir.), 197 F.2d 994 8449

Wolcher vs. United States (Nov. 17, 1952, 9 Cir., No. 12,992), ...F.2d 8443, 8451, 8452

Statutes

Act of June 25, 1948, Section 21, 62 Stat. 683, 862 8443

Nos. 12,597 and 12,607

In the United States Court of Appeals
for the Ninth Circuit

No. 12,597

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Come now appellants above named and hereby apply for leave to file this supplemental petition

for rehearing in the above-entitled causes, pray that said supplemental petition be heard en banc, and pray that the order of this Court, dated November 18, 1950, denying appellants' petition for rehearing, be vacated, and in support thereof respectfully allege as follows:

I.

The Order of Amendment filed and entered herein on November 18, 1952, substantially modified the opinion filed and entered herein on September 6, 1952, and if appellants are to have the benefits intended by the rules permitting the filing of a petition for rehearing, they should be permitted to address such a petition to the amended or modified opinion.

II.

In their petition filed herein on October 3, 1952, appellants prayed, inter alia, that a rehearing be granted en banc. The order denying the petition for rehearing filed and entered herein on November 18, 1952, did not even rule upon this portion of appellants' petition for rehearing. Appellants are at least entitled to a ruling of the Court on an application made to it and their application that the petition for rehearing be heard en banc ought to have been passed upon and not simply ignored.

III.

On the day before the panel which heard this case denied the petition for rehearing, another panel of this Court decided another case in a sub-

stantially different way. While this panel refused to apply the rule of Kotteakos vs. United States (1946), 328 U.S. 750, to the case at bar, that rule was applied to another case by a panel consisting of Judges Healy, Orr and Pope who reversed a conviction because of technically erroneous rulings respecting the admission and exclusion of evidence (Wolcher vs. United States [Nov. 17, 1952, 9 Cir., No. 12,992], ... F.2d .....). None of the errors in that case was as serious or prejudicial as the errors here present.

Argument

I.

On September 6, 1952, Judges Stephens, Pope and Bone, "after thorough discussion in conference and after independent consideration of all issues,"[1] concluded that the saving clause in Section 21 of the Act of June 25, 1948, 62 Stat. 683, 862, "expressly preserved"[2] to the Government the right to prosecute appellants under the repealed five year statute of limitations.

On November 18, 1952, after apparently the same thorough discussion and independent consideration of all issues, the same three judges concluded that "the Saving Clause cannot be given the broad effect claimed for it by the government"[3] and

[1]Bridges, et al. vs. United States (Sept. 6, 1952, 9 Cir., No. 12,597, Slip Sheet p. 52), ...F.2d .....

[2]Ibid., p. 8.

[3]Ibid., Order of Amendment, November 18, 1952, Typewritten Order, p. 3.

specifically held "that the statute of limitations of five years for violations of offenses under the Nationality Act yielded to the three-year provision as of the effective date of the revision."[4]

Appellants, of course, do not quarrel with this modification of the Court's opinion since it reflects now for the first time a position which appellants have been urging for three and one-half years in this case. However, this complete reversal of views on this issue by the panel of judges deciding this case demonstrates the merit of appellants' contentions and supports appellants' argument that if all issues in this case, including the issue of the applicability of the Suspension Act, were submitted to the entire Court en banc, there is at least a reasonable basis for supposing that the result would be different.[5]

Furthermore, on the issue of the Suspension Act itself the thoroughly considered opinion of September 6, 1952, was subject to substantial modification although the panel still adhered to its original conclusion.

For the first time the panel in its amendment of November 18, 1952, suggests that the conclusions of the Court of Appeals for the District of Columbia in Marzani vs. United States (1948, C.A. D.C.), 168 F.2d 133, were based upon that Court's own

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[4]Ibid., p. 4.

[5]See Judge Pope's dissenting opinion in Bradley Mining Company vs. Boice (1952, 9 Cir.), 198 F.2d 790, 792.

conclusions that the Supreme Court cases[6] held that the Suspension Act did not apply to non-pecuniary frauds. In so doing the panel completely misreads the Marzani case. The Court in the Marzani opinion carefully analyzed the Government's contention that fraud was an "essential element" of false swearing.[7] It rejected that contention not upon the ground suggested by the panel in its presently modified opinion but upon the ground that the Suspension Act did not apply to that kind of fraud—even if it were fraud. Here is its language:

> "The difficulty with the foregoing contention is that it ignores the plain rulings in Noveck and kindred cases. Those cases involved false statements, under oath. The offenses tendered to obstruct, by dishonest means, the operation of a department of the Government. The Court held that the Suspension Act (actually an identical

[6]United States vs. Noveck (1926), 271 U.S. 201; United States vs. McElvain (1926), 272 U.S. 633; United States vs. Scharton (1932), 285 U.S. 518.

[7]Incidentally, the panel's addition to its opinion of September 6, 1952, of a footnote now to be numbered 2a which recites that Bridges was not charged with perjury or with having made a false statement under oath (Typewritten Order, supra, note 3, p. 1), while it is another modification of the earlier opinion, does not in any way sustain the Court's conclusion because that is precisely what Marzani (supra), Obermeier (infra), and Anzalone (United States v. Anzalone [1952, 3 Cir.], 197 F.2d 714) were charged with, and that made no difference in the result in their cases.

predecessor) does not apply to such offenses. So that even if the False Claims Act does involve the sort of fraud the Government says it does, the Suspension Act does not apply; the rulings in the Noveck and similar cases related to precisely that same sort of fraud. Despite the vigor and skill with which the Government's contention is pressed upon us by its counsel, we can see no escape from that conclusion. It follows that we are of opinion that the first nine counts of this indictment were barred by the statute of limitations, and the defendant's motion that they be dismissed should have been granted." (168 F. 2d at 137, emphasis supplied.)

The Court of Appeals for the District of Columbia is not the only Court with which this panel disagrees on the issue of the applicability of the Suspension Act. It also is in conflict with the Court of Appeals for the Second Circuit on this precise issue, a fact which was pointed out in appellants' petition for rehearing but which is not mentioned in the amendment of November 18, 1952. For in Obermeier v. United States (1950, 2 Cir.), 186 F. 2d 243, the Court of Appeals for the Second Circuit held not only that the saving clause did not sustain the prosecution,[8] but it also held that the Suspension Act could not save the prosecution because

[8]A proposition with which this panel disagreed on September 6, 1952, but with which it apparently now agrees.

fraud was not inherent in the crime of false swearing in a naturalization proceeding.

"The government contends, however, that in any event the War Time Suspension of Limitations Act preserved its right to prosecute this action. That Act, so far as pertinent, is substantially the same as the Acts interpreted by the Supreme Court in United States v. Noveck, 271 U. S. 201, 46 S. Ct. 476, 70 L. Ed. 904,[9] United States v. McElvain, 272 U. S. 633, 47 S. Ct. 219, 71 L. Ed. 451,[10] and United States v. Scharton, 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917.[11] As so interpreted, it suspends a statute of limitations only when fraud or attempted fraud against the United States (or one of its agencies) 'is an ingredient under the statute defining the offense,' and does not, absent such a statutory definition, apply to perjury or false swearing even when the United States is directly interested.[12] Nothing in 8

[9]Perjury in an income tax return. [Court's footnote.]

[10]False income tax return. [Court's footnote.]

[11]Attempt to evade taxes by falsely understating taxable income. [Court's footnote.]

[12]In U S. v. Gilliland, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598, the offense was so defined as to make fraud an ingredient. So, too, in Gottfried v. United States (2 Cir.), 165 F. 2d 360, as we there interpreted the statute creating the crime. See also Marzani v. United States, 83 U. S. App. D. C. 78, 168 F. 2d 133. [Court's footnote.]

> U.S.C.A. § 746(a)(1), under which defendant was indicted, makes fraud an ingredient of the crimes." (186 F. 2d at 256-257; emphasis supplied.)

The panel apparently did not even recognize that the Second Circuit held that fraud was not an ingredient of the crime charged in Count II of this very indictment.

Furthermore, the ambiguity manifest in the panel's thinking on the coverage of the Suspension Act has not been removed by the modification of November 18, 1952.

On the one hand the panel still says:

> "* * * it is well to have in mind that not every fraud against the government, whether inherently pecuniary or otherwise, comes within the effect of the Suspension Act."[13]

On the other hand, the panel still says:

> "We therefore conclude that the Suspension Act applies to every offense involving fraud against the government whether pecuniary or not."[14]

This leaves open the question of whether the Suspension Act does or does not apply to "every fraud" or "every offense involving fraud" against the Government. And it does not even touch the question of what kinds of "frauds" are, and what

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[13]Slip Sheet, supra, note 1, page 11.

[14]Ibid, page 17.

kinds are not, covered by the Suspension Act. No consideration is given the rationale of United States v. Smith (1952), 342 U. S. 225, which demonstrates that the Suspension Act is applicable not to all offenses involving fraud, but only to offenses "arising out of the war effort."

Certainly, in view of the fact that the panel is in conflict with two other circuits, the fact that the first petition for rehearing resulted in a substantial modification of the panel's thinking on one phase of the case, and the fact that even now the panel's reasoning on the Suspension Act is ambiguous and contradictory, appellants' request that the case be reheard en banc should be granted.

II.

On October 3, 1952, appellants petitioned for a rehearing and made application that their petition for rehearing be heard en banc. This application has apparently not yet been ruled upon. The only orders entered on November 18, 1952, were orders amending the opinion of September 6, 1952, and orders denying appellants' petitions for rehearing. There was no order either granting or denying the application that the rehearing be heard en banc, nor was there even an order striking it as was done in Western Pacific Railroad Corporation v. Western Pacific Railway Company (1952, 9 Cir.), 197 F. 2d 994, 1012.

Appellants certainly are entitled to have a ruling upon an application which they make to the Court that in the event they ultimately are required to

proceed further in this cause they may have a record to present to the Supreme Court. Since the Supreme Court has granted certiorari in the Western Pacific case ([October 13, 1952],.... U.S. ...., 73 S. Ct. 28, 29), it is obvious that the question of appellants' right to petition for a rehearing en banc is an open one and one which the Supreme Court thinks is of sufficient importance to be reviewed by it. That right should not be foreclosed by this panel's ignoring the existence of such an application.

Furthermore, if the reasons assigned by Judge Pope in his dissenting opinion in the Bradley Mining case, supra, and the reasons assigned by both Judge Healy and Chief Judge Denman in their respective opinions in the Western Pacific case, supra, have any cogency at all, then it is clear that this is one case perhaps out of hundreds where a rehearing en banc should be granted. Not only is there the existence of conflicts with at least two other circuits on the question of the application of the Suspension Act; not only does the substantial modification of the panel's opinion of September 6, 1952, demonstrate a lack of certainty and clarity of the grounds upon which the judgment is now being affirmed, but on the very day before the petition for rehearing was denied, another panel of this Court reversed a conviction upon the basis of the Kotteakos rule, while the panel in this case refused to apply the Kotteakos rule here. The errors committed in the other case were certainly less substantial than those involved in this case. This brings us to our last point.

III.

In their petition for rehearing,[15] appellants, emphasizing the prejudicial character of the errors committed by the trial Court, urged this panel to apply to this case the rule of Kotteakos v. United States (1946), 328 U. S. 750, and to reverse the conviction because it could not be said that those errors, substantial as they were, had no effect upon the ultimate outcome. Neither in its original decision of September 6, 1952, nor in its Order of Amendment of November 18, 1952, did this panel so much as mention the Kotteakos case.

However, on November 17, 1952, a conviction for wilfully and knowingly attempting to defeat some $30,000 of income taxes by failure to report over-ceiling sales of liquor was reversed by a panel of Judges Healy, Orr and Pope. (Wolcher v. United States, supra.) That panel, relying on the Kotteakos case, reversed because no "proper foundation" was laid for certain documents which were received in evidence against the defendant, and because certain evidence which the defendant wished to offer to corroborate his testimony on the price of pinball machines was rejected.[16]

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[15]The point, of course, was made earlier in briefs and argument before the decision of September 6, 1952.

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[16]The evidence offered on behalf of Wolcher, the exclusion of which resulted in the reversal, consisted of a magazine called "Billboard." The evidence offered on behalf of Robertson and Schmidt, the exclusion of which did not result in reversal, consisted of a decision of the Supreme Court of the United States. The incongruity is manifest.

In the Wolcher case the errors were highly technical and certainly did not reflect any unfairness on the part of the trial judge. We do not say that Wolcher's conviction should not have been reversed. We do say that if Wolcher's conviction had to be reversed, then this conviction must a thousand times more so be reversed. For the errors here were not purely technical. They were serious errors and reflected upon the fairness of the trial accorded appellants. This panel itself has characterized the trial judge's conduct as "in poor discretion," as likely to lead to "misunderstanding," and as lacking in "that true idealism" which a trial Court should manifest. The instructions he gave were not to be "commended," said this panel.

If ever there was a case where the Kotteakos rule should apply, this is it. Yet on one day, one panel of this Court refuses to apply the Kotteakos rule in the case of three labor leaders, while on the day before another panel of this Court has no hesitancy in applying it in the case of a big liquor dealer and pinball operator.

Conclusion

Not only is it important that justice be done in this case, but it is important that justice appear to have been done.

If Wolcher is entitled to a new trial because a document was admitted against him without a "proper foundation," why is not Bridges entitled to a new trial because the trial judge told the jury, in effect, that there should be an "ultimate conviction" because of "uncontradicted evidence" establishing

his guilt to "a certainty," and that they were to convict unless there was a "good reason" for not doing so? If Wolcher is entitled to a new trial because there was excluded from his defense the "Billboard" magazine, why are not Robertson and Schmidt entitled to a new trial because there was excluded from their defense the decision of the Supreme Court of the United States?

This case is replete not only with error, it is replete—to give the Government the benefit of the doubt—with very close questions of law. Why is it that every single question is resolved against these appellants?

If a labor leader and his associates are to receive an equality of treatment with a "pinball king," then the least these appellants are entitled to is a new trial.

May they not have these questions examined by the full Court?

Wherefore, appellants respectfully apply for leave to file this supplemental petition for rehearing, and pray that said petition be heard en banc, and pray that the order of November 18, 1952, denying their petition for rehearing be vacated.

Dated, San Francisco, California, November 25, 1952.

Respectfully submitted,

GLADSTEIN, ANDERSEN & LEONARD,

NORMAN LEONARD,

Attorneys for Appellants.

Certificate of Counsel

I hereby certify that I am of counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing application for leave to file supplemental petition for rehearing, prayer that supplemental petition for rehearing be heard en banc, and that order denying petition for rehearing be vacated, is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California, November 25, 1952.

NORMAN LEONARD,
Of Counsel for Appellants.

[Endorsed]: Received November 25, 1952, U.S. C.A.

[Endorsed]: Filed December 29, 1952, U.S.C.A.

United States Court of Appeals
for the Ninth Circuit

No. 12,597

Order

HARRY RENTON BRIDGES, J. R. ROBERTSON, AND HENRY SCHMIDT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 12,607

Order

HARRY RENTON BRIDGES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Dec. 29, 1952

Application for Leave to File, Etc.

Before: Stephens, Bone, and Pope,
Circuit Judges

PER CURIAM

Following our denial of the petition for rehearing in the above-entitled cases, there was received at the clerk's office a document entitled "Application for Leave to File Supplemental Petition for Rehearing,

Prayer That Supplemental Petition for Rehearing be Heard En Banc, and that Order Denying Petition for Rehearing be Vacated." The instrument is addressed to all of the judges of the court and was lodged with the clerk's office after the time for filing a petition for rehearing had expired and after the appellants had obtained from the United States Supreme Court an extension of time within which to petition for the writ of certiorari. Copies of our opinion, amended opinion, original petition for rehearing, and the document above mentioned, have been distributed to each active member of the court.

A United States Court of Appeals consists of three circuit judges, and, in circuits having more than three judges, it consists of a "Division" of three judges. In exceptional circumstances it may consist of all the active members of the circuit sitting in banc. A "Division" court is no less a court than an "in banc" court.

In Western Pacific R. R. Corp. v. Western Pacific R. Co., 9 Cir., 1951, 197 F. 2d 1013, the members of this court had before it an application similar to the one we are now dealing with and in that case the Supreme Court has granted the writ of certiorari without specifying whether it will deal with the subject of in banc procedure. We reaffirm the view taken by us in the Western Pacific case, to wit, that the assignment of causes for hearing of appeals pending in our court is at all times and in all circumstances, save only as to disqualification of a judge, the exclusive right and duty of the whole court and that it is not a privilege of litigants to

request that their cases be heard by any selected court sitting in division or sitting in banc. Whether the case will be reheard after decision, and, if reheard, by which particular judges, are matters entirely for the court itself.

However, it is manifestly desirable that the final disposition of the instant cases should not be complicated because of any disposition the Supreme Court may make of the Western Pacific case, or delayed awaiting decision in that case, and for these reasons, and these reasons alone, we proceed to state the basis for our ruling on the document presented for filing with the clerk.

Section 46(c) of Title 28, U.S.C.A. provides:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active judges of the circuit."

All of the members of the Division to which these cases were assigned, and to which they remain assigned, are of the opinion that the cases do not differ from the regular business of the court in any respect which would justify treatment different from that accorded other cases and, therefore, all of the members are opposed to any reassignment of them or of any phase pertinent to them. Since Chief Judge Denman has disqualified himself in each of the cases, it is manifest that a majority of the cir-

cuit—or four members thereof—have not and will not, grant any petition for rehearing in banc in regard to them.

A moment's thought dispels the notion that petition for rehearing in banc after decision in Division should necessitate the convening of the whole court for its consideration. If such a petition must be considered by the court in banc, most, if not every, lawyer on the losing side of a case before a Division would feel it his duty to ask the whole court to take it over. No judge, required to pass on the question, would do so without knowing the case through the records and the briefs, and even then, he would not have the benefit of open conference that our oral argument amounts to. We are of the opinion that the statutory power given the court to grant rehearings was never meant to provide an appeal from Division to the Court In Banc, but was meant to provide power for the court itself to control its affairs. It seems reasonably certain that the provision of Section 46(c) (in banc hearings) is expressed in the negative for the purpose of affording the power we suggest and, at the same time, of avoiding undesirable results. The whole active membership of the court acts upon the original assignment, and, "unless" and "until" the assignment is changed, the assignment continues. No suggestion is made in the statute that litigants have any choice as to the individual judges who shall sit on their cases, or whether they shall be heard in Division or in banc.

We have considered the petition to file the docu-

ment first hereinabove mentioned, and have considered the reasons therein as to why appellants think our order denying the petition for a rehearing should be vacated and a rehearing should be granted. Since we amended our opinion after the filing of the original petition for a rehearing we now order that the document lodged with the clerk be filed as a petition to the "Division" and as a second petition for rehearing, and as such it is denied. The motion to vacate our order denying the original petition for a rehearing is denied.

[Endorsed]: Opinion on Application for Leave to File, etc. Filed Dec. 29, 1952. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Nos. 12597 and 12607

[Title of Causes.]

Excerpt from Proceedings of Monday, December 29, 1952.

Before: Stephens, Bone and Pope,
Circuit Judges

ORDER DIRECTING FILING OF APPLICATION, ETC., AND DENYING SECOND PETITION FOR A REHEARING, ETC.

By direction of the Court, It Is Ordered that the application for leave to file supplemental petition for rehearing, etc., received November 25, 1952, be filed as a second petition for rehearing of above causes.

Upon consideration of such second petition for a rehearing, and pursuant to the Per Curiam Opinion thereon this day filed,

It Is Further Ordered that said second petition for rehearing be, and hereby is denied.

It Is Further Ordered that the motion to vacate our order of Nov. 18, 1952, denying the original petition for rehearing be, and hereby is denied.

United States Court of Appeals
for the Ninth Circuit

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO SUPPLEMENTAL RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 23 pages, numbered from and including 8437 to and including 8460, to be a full, true and correct copy of the supplemental record of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 13th day of January, 1953.

[Seal]: PAUL P. O'BRIEN,
Clerk.